Court of Queen's Bench of Alberta

Citation: SI v ASSK, 2015 ABQB 797

Date:
Docket: 4801 149589
Registry: Calgary

Between:

S. I.

Plaintiff/Applicant

- and -

A.S.S. K.

Defendant/Respondent

Memorandum of Decision
of the
Honourable Mr. Justice D.B. Nixon

Introduction

[1] The mother, Ms. I., brings this application for primary care and control of her son. The mother and the father, Mr. K., are divorced and live in Canada. The child is currently residing in Jordan with his paternal grandmother. The mother has had little access since July 2014.

[2] The dispute centres on whether the father is in breach of a consent order issued in October 2013 that required him to move out of the City of Calgary by July 31, 2014.

Factual Background

[3] The parties were married in Saudi Arabia in August 2002. There is one child of the marriage, a son, born in 2005.

[4] The parties moved to Calgary in June 2006 and separated in March 2007. The mother obtained an *ex parte* interim parenting order from the Provincial Court of Alberta on March 23, 2007.

[5] A Joint Divorce Judgment (Without Oral Evidence) was issued on June 5, 2012 granting an order for joint custody of the child in a 50:50 shared parenting arrangement. Both parties were residents of Calgary at that time.

[6] A consent variation order dealing with custody, parenting and child support was issued on October 10, 2013 (the "Consent Order"). Clause 18 is at the crux of the current dispute and reads as follows:

> The Husband shall move out of the City of Calgary on or before July 31, 2014. If the Husband does not move away from the City of Calgary on or before July 31, 2014, the terms of this Consent Variation Order shall be unenforceable beyond July 31, 2014, and the terms regarding custody, parenting, and child support as set out in the parties Joint Divorce Judgment shall prevail.

[7] Ms. I. agreed to the Consent Order because of her "continuous conflict" with Mr. K. and his alleged "child manipulation." She thought it would be in her son's best interests to have the benefit of a relationship with his father, without the constant tension between the parents. She understood that Mr. K. was going to move to Jordan or a country in that region.

[8] Mr. K. alleges that he moved out of Calgary, as required by the Consent Order, on July 24, 2014. Ms. I. disputes this assertion. Meanwhile, the child was taken to Jordan in July 2014, where he has remained in the care of his paternal grandmother.

[9] At the time of the Consent Order, Mr. K. lived in subsidized housing in the City of Calgary. To qualify to live in that housing, occupants must meet a means test, and the subsidized unit must be the occupant's only residence.

[10] Mr. K. states in his affidavit that effective July 24, 2014 he kept his Calgary residence as his mailing address only, and that his physical living address was his friends' residence in Conrich, Alberta. Conrich is approximately 5 km outside Calgary's city limits.

[11] Mr. K offers the affidavit of his friend, Mr. Reyad Abusalim, dated July 31, 2015, in support of his assertion that he relinquished his residence in Calgary in July 2014. Mr. Abusalim states that on or about July 24, 2014 Mr. K. moved into the residence in Conrich, Alberta, which Mr. Abusalim was sharing with his brother, Mr. Salim Abusalim.

[12] Mr. K. states that he relocated to the Conrich residence of Mr. Abusalim to fulfil his obligations under the Consent Order and acquire sole custody of his son. He also explains that his physical living address has changed "from time to time since then when I moved to Fort

McMurray, to Jordan, to the Conrich residence and *then the Calgary residence* and now Vancouver" (emphasis added).

[13] Mr. K.'s evidence was contradicted by the testimony of Mr. Devan Lovatt, a property manager for the past eight years with the Calgary Housing Company, responsible for subsidized housing. Mr. Lovatt testified that Mr. K. has been a continuous tenant of a subsidized housing unit offered by Calgary Housing Company since September 2009. He said Mr. K. has never given notice of an intention to vacate his unit.

[14] Mr. Lovatt also confirmed that Mr. K. remained a tenant as at the date of the *viva voce* component of this hearing, on September 3, 2015. He explained that tenants of subsidized housing cannot have another residence elsewhere because, if they did, they would be displacing those in need of subsidized housing within the City of Calgary.

[15] On cross-examination, Mr. Lovatt was asked if he saw Mr. K. during July, 2014. Mr. Lovatt testified that he met with Mr. K. on July 24, 2014, so that Mr. K. could sign a lease renewal agreement for his housing unit. The Court notes that the day Mr. K. signed the lease renewal was the same day he asserts he moved out of Calgary.

[16] The address recorded on Mr. K.'s 2014 income tax return is the Calgary subsidized housing unit address. This is also the address on the T4 slips issued by his employer for the 2014 calendar year, which would have been issued in February 2015. On March 30, 2015, Canada Revenue Agency issued its 2014 Notice of Assessment for Mr. K. using the same address. Furthermore, Ms. I. testified that in September 2014 she drove by Mr. K.'s Calgary residence and observed that property belonging to him was still there, including his vehicle.

[17] Mr. K. states that he moved to British Columbia in July 2015 to attend school for a few months. He presented a receipt, dated August 12, 2015, evidencing the payment of rent and a damage deposit for accommodation in Vancouver. August 12 is the same day the first component of this Domestic Special Chambers application was heard.

[18] There is no evidence that Mr. K. has moved to British Columbia permanently. Further, there is no evidence that he has given notice to his landlord in Calgary that he is moving out of his home. Indeed, the receipt for the accommodation in Vancouver, BC that Mr. K offered as proof of his residence in that city had preprinted wording on it that referred to "Travel/Vacation/Temporary Housing." This documentation contradicts the accretion of Mr. K. that he had established a residence in Vancouver.

[19] On June 28, 2015, the Court of Legitimate Sweileh in the Hashemite Kingdom of Jordan issued an order which stated that the child would "reside with me [the paternal grandmother] under my custody and care, with the knowledge that his Mother and his Father resides [sic] in Canada."

[20] There is no evidence that Ms. I. was given notice of the application in Jordan or that she was given any opportunity to address that foreign court, directly or indirectly. There also is no evidence that the Jordanian Court considered the best interests of the child. Jordan is not a party to the Hague Convention.

Issues

1. Did Mr. K breach the Consent Order by failing to "move out of the City of Calgary" on or before July 31, 2014?

2. Do the Alberta Courts have jurisdiction over the child?

3. Has there been a material change in circumstances?

4. Should the child be returned to Alberta?

Analysis

Did Mr. K. breach the Consent Order by failing to "move out of the City of Calgary" on or before July 31, 2014?

[21] Clause 18 of the Consent Order is not precise, but the language of the clause and the evidence before the Court suggest that the phrase "...Mr. K. was to move out of the City of Calgary..." meant that he was to relinquish his residence in Calgary. Whether he was to move to Jordan or another country in that region of the world need not be decided at this time. At the very least, Mr. K. was required to relinquish his residence in Calgary.

[22] The concept of residence is a question of fact, and entails something more than mere physical presence. It is trite law that an individual's place of residence is his or her abode where, in the settled routine of a life, the individual regularly or customarily lives. The elements of residence include the place where an individual has a right to occupy a dwelling; where an individual has personal property; and where bank accounts are situated. Additional indicia of residence include the address noted on each of a personal income tax return, a driver's license, a vehicle registration, and on provincial health insurance and hospital records.

[23] Staying at a location for a brief period of time does not constitute taking up residence, unless that stay equates to, or becomes, a place where the individual begins to live in the settled routine of life. A temporary stay at a friend's home does not amount to a new residence.

[24] Based on all the evidence, I find that Mr. K. did not "move out of the City of Calgary" on or before July 31, 2014. I find that there are too many inconsistencies in his testimony to come to this conclusion. For example, in his August 21, 2015 affidavit he states that he kept his Calgary residence as his mailing address and that the Conrich residence was his physical living address. But he then went on to assert that his residence changed from time to time between July 24, 2014 and August 21, 2015, and referenced living in Fort McMurray, Jordan, Conrich, Vancouver, and Calgary.

[25] The fact that Mr. K. returned to his Calgary residence during this time period suggests that his subsidized housing unit was always available to him. If this was not the case, he should have lead evidence to rebut this point. Further, Mr. Abussalim's affidavit is insufficient to support the assertion that the Conrich accommodation had become Mr. K.'s new residence. More substantive evidence is required. The mere fact that he occupied some sort of accommodation at the Conrich location does not amount to making it his residence.

[26] I find that Mr. K. never relinquished his residence in Calgary. I accept Mr. Lovatt's evidence that Mr. K. renewed his lease for the Calgary subsidized housing property on July 24, 2014. This is not a residential unit that Mr. K. could sublet to a third party. If he did not occupy it, it would have been taken from him by the Calgary Housing Company.

[27] I find that Mr. K breached clause 18 of the Consent Order because he did not move out of Calgary on or before July 31, 2014. As a result, the terms regarding custody, parenting, and child support as set out in the Joint Divorce Judgment, dated June 5, 2012, apply.

Do the Alberta Courts have jurisdiction over the child?

[28] Mr. K. argues that the Alberta Courts cannot take jurisdiction over his son on the basis that the Jordanian Court has taken jurisdiction over the custody of the child. I disagree.

[29] This Court presumptively has jurisdiction. This Court granted a decree of divorce and an order for corollary relief. This Court also issued the subsequent Consent Order.

[30] Section 4 of the *Divorce Act* gives a court in a province jurisdiction to hear a corollary relief proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding. Section 5 grants jurisdiction in a variation proceeding on the same grounds. It is clear that Ms. I. has been ordinarily resident in Alberta since 2006, and it is undisputed that Mr. K. was ordinarily resident here at the commencement of these proceedings.

[31] In *Roco v Roco*, 2010 ABQB 683 Lee J considered whether the court had jurisdiction over children residing with their grandmother in the Philippines. The judge explained that the statutory scheme under the *Divorce Act* replaces the common law approach to determining jurisdiction; there is no need for the court to examine whether the child has a real and substantial connection to the forum.

[32] Once a court has jurisdiction, however, it must consider whether it should exercise that jurisdiction or decline in favour of another forum. Lee J stated in *Roco* at para 14 that "[g]enerally speaking, the most appropriate forum is that of the jurisdiction which has the closest connection with the action and the parties." The father argues that the child has been ordinarily resident in Jordan for the past year and that the Jordanian court has issued an order, thereby making it the preferred forum. I reject these arguments.

[33] I have found that both parties have been resident in Alberta at all relevant times, and the mother continues to be resident here. Whether or not the father remains resident here or has moved to British Columbia is immaterial. The child was resident in Alberta for 9 out of his 10 years. There are prior orders of this Court relating to this child. Given my conclusion above that Mr. K. breached the Consent Order, the terms of the Joint Divorce Judgment automatically apply and the parents have joint custody of the child in a 50:50 shared parenting arrangement.

[34] Ultimately, the deciding factor is the best interests of the child (see *Roco* at para 16). There is no evidence the Jordanian court considered the best interests of the child, nor is there evidence that the mother, Ms. I., was given notice of the application or an opportunity to be heard. In these circumstances, this Court will not cede jurisdiction to the Jordanian Court.

Has there been a material change in circumstances?

[35] Ms. I. seeks day-to-day care and control of the child and final decision making authority. Since this would amount to a variation of the custody arrangement under the Joint Divorce Judgment, she first must meet the requirements of s 17 of the *Divorce Act* and establish that there has been a material change in circumstances that has altered the child's needs or the ability of the parents to meet those needs in a fundamental way.

[36] I find that there has been such a change. The Consent Order was premised on the father moving out of the City of Calgary and having sole custody and primary parenting of his son. That did not happen. Instead, the child was taken to Jordan and has been left with his paternal grandmother, while the father has remained in Canada. As a result, the child does not have the benefit of living with either parent.

[37] This Court's primary concern is the best interests of the child. While there is obvious tension between the parents, it is also apparent that both parents care for their son. I reject Mr. K.'s suggestion that Ms. I. does not care for her child.

[38] The best interests of a child typically require that the child be exposed to, and be under the care and control of, one or both parents. The *Divorce Act* sets out the maximum contract principle at ss 16(10) and 17(9). It may be that the child is well cared for by his grandmother, but having primary day-to-day care with someone other than either parent is a material change in the circumstances of this case.

[39] I find that Ms. I. has established a material change in circumstances and I conclude that the child's best interests lie in giving her day-to-day care and control. She also will be given final decision making power. I come to this conclusion primarily because of the ongoing tension between the parents indicates that they will not be able to work together in the best interests of the child. The harsh comments by Mr. K to Ms. I in a multitude of communications is the basis for this decision by the Court.

Should the child be returned to Alberta?

[40] Mr. K. submits that the child should remain in Jordan with his the paternal grandmother. He argues that Ms. I. provided written consent for their son to be taken out of the jurisdiction. This court accepts that Ms. I. gave such consent, but it was premised on the assumption that Mr. K. would be living with the child and caring for him. There is no evidence that Ms. I. was aware that the child would be placed in the care of his paternal grandmother while Mr. K. continued to live in Canada.

[41] Mr. K. also argues that the Consent Order granted him sole custody and decision making power. This too is true; however, the terms of the Consent Order were to be unenforceable if Mr. K. did not move out of the City of Calgary on or before July 31, 2014. Since I have found that he did not do so, the Joint Divorce Judgment applies and the parties continue to have joint custody.

[42] Finally, Mr. K. submits that the paternal grandmother has obtained a custody order in Jordan, thereby ousting the jurisdiction of this Court. As discussed above, I reject this argument and have found that this Court has retained jurisdiction over the child.

[43] The child should be returned to Alberta into the care of his mother.

Other matters

[44] Notwithstanding the above findings, it is important for the child to have exposure to both parents. Accordingly, this court asks the parties to work out Mr. K.'s access arrangements. I seize myself of this matter and if the parties cannot agree on access, they can bring the matter back before me. I further order Mr. K. to return before me on or before January 15, 2016 to report on the status of the child.

[45] On November 19, 2015, Mr. K.'s counsel wrote a letter to the court asking that Mr. K.'s passports be returned to him (they are currently in the custody of Ms. I.'s counsel). The letter was not accompanied by any application or supporting evidence. I will not address this issue until appropriate procedures are followed; however, I will seize myself of any such application until the child is returned to Canada.

Costs

[46] If the parties cannot agree on costs, they can speak to the matter within 30 days of the date of this judgment.

Heard on the 12th day of August, 2015 and
the 3rd day of September , 2015.
Dated at the City of Calgary, Alberta this 16th day of December, 2015.

D.B. Nixon
J.C.Q.B.A.

Appearances:

Timothy J. Corcoran
for the Plaintiff/Applicant

Max Blitt, QC
for the Defendant/Respondent